STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 96-F-02

Date issued: February 20, 1996

Requested by: Sparb Collins, Public Employees Retirement System

- QUESTION PRESENTED -

Whether the prohibition against duplicate coverage in N.D.C.C. § 54-52-02 applies to an employee who has concurrent employment relationships with the state and as a result is required to participate in PERS and another state retirement system.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that the prohibition against duplicate coverage does not apply to an employee who has concurrent employment relationships with the state that result in mandatory participation in PERS and another state retirement plan.

- ANALYSIS -

Your question specifically concerns the application of North Dakota Century Code (N.D.C.C.) § 54-52-02 to an employee of the Department of Human Services who accepted concurrent full-time employment as an assistant professor at Minot State University. As an assistant professor, the employee was informed that participation in the Teachers' Insurance and Annuity Association of America - College Retirement Equities Fund (TIAA-CREF) was mandatory. In light of the prohibition in N.D.C.C. § 54-52-02 against duplicate coverage, you ask whether the employee continues to be an eligible employee under the Public Employees Retirement System (PERS) because of the employee's concurrent participation in TIAA-CREF.

N.D.C.C. § 54-52-02 provides that "[e]mployees presently covered by a pension plan or a retirement plan to which the state is contributing, except social security, are not eligible for duplicate coverage." Except for slight statutory changes in 1973 and 1989, this prohibition against duplicate coverage has remained essentially the same since the 1965 adoption of the PERS plan. See 1973 N.D. Sess. Laws ch. 246; 1989 N.D. Sess. Laws ch. 665.

The meaning of a statute must be sought initially from the statutory language. County of Stutsman v. State Historical Soc'y, 37l N.W.2d 32l, 325 (N.D. l985). Words in a statute are to be given their plain, ordinary, and commonly understood meanings. Kim-Go v. J.P. Furlong Enterprises, Inc., 460 N.W.2d 694, 696 (N.D. 1990). Consideration should be given to the ordinary sense of the words, the context in which they are used, and the purpose which prompted their enactment. County of Stutsman, 37l N.W.2d at 327.

The prohibition in N.D.C.C. § 54-52-02 against duplicate coverage applies only to "[e]mployees presently covered by a pension plan or retirement plan to which the state is contributing . . . ." The retirement plans and employees subject to this prohibition are not further described in this section, but have been discussed by this office in previous opinions.

In 1988, the Attorney General issued an opinion concerning the application of this prohibition to an eligible employee who changed positions and wanted to waive participation in PERS and continue the employee's participation in TIAA-CREF. That opinion stated:

> The legislative history of N.D.C.C. ch. 54-52, however, indicates that at the time PERS was established in 1965 "North Dakota [had], of course, special retirement plans for a very limited group of state officers and employees." A Report on Retirement Program by Lester Kelley, Hearing on S.B. No. 164 Before the Industry, Business, and Labor Committee, 39th Leg. Session (February 4, 1965). Therefore, the clause in N.D.C.C. § 54-52-02 that refers to "employees presently covered by a pension plan" is applicable only to those arrangements existing in 1965 and would not be relevant in resolving the present issue.

Letter from Attorney General Nicholas J. Spaeth to Mr. Alan Person (November 23, 1988) (alteration in original). The Attorney General concluded that PERS participation could not be waived in favor of continuing the employee's participation in TIAA-CREF.

Not cited in this 1988 letter was a 1966 opinion of the Attorney General discussing the newly-created Public Employees Retirement System, including the issue of duplicate coverage. At issue in this 1966 opinion was whether employees who were presently covered by a state pension or retirement plan could be excluded from membership in PERS. The opinion stated that the terms "employees covered" and "employees presently covered" were "used in connection with insurance and retirement plans," and indicated that "full and adequate protection was intended." 1966 N.D. Op. Att'y Gen. 304. The

Attorney General also summarized the purpose of the prohibition against duplicate coverage:

> [T]he Legislature intended to prohibit state funds from being used to simultaneously make payments toward more than one retirement plan, other than social security, or that an employee or officer earn benefits simultaneously in more than one plan even though the state's contribution may be delayed under any such plan until retirement.

1966 N.D. Op. Att'y Gen. 304, 306. Despite this purpose, the Attorney General concluded that equity nevertheless entitled employees participating in other mandatory retirement plans when PERS was enacted to participate in PERS if the employee determined that the employee's current plan did not provide full or adequate protection. This office later concluded that the duplicate coverage prohibition applied only to PERS and its relationship to other retirement plans. Letter from Special Assistant Attorney General Vernon Pederson to M.F. Peterson (April 5, 1966).

After further review of both the 1988 and 1966 opinions, I believe they need to clarified, particularly as applied to an employee who has two concurrent employment relationships with the state. The legislative history quoted in the 1988 opinion is a one-line reference to the existence of other retirement plans in 1965. The effect given by the 1988 opinion to this reference was not necessary to reach the conclusion. In addition, construing this cryptic reference to "special retirement plans" as limiting the plans subject to the prohibition against duplicate coverage to those existing in 1965 would unduly narrow the purpose of that prohibition. Such a narrow interpretation would only make sense if duplicate coverage were otherwise precluded by a repeal of the other mandatory plans existing in 1965 and if all employees hired after 1965 were required to participate in PERS.

As acknowledged in the 1966 opinion, one must assume that the Legislature was aware of the other state plans that required mandatory participation by certain officials or employees. However, these mandatory plans were not repealed by the 1965 enactment of PERS. Thus, if the duplicate coverage prohibition were construed as applying only to those participating in the other mandatory plans in 1965, or to those plans existing in 1965, employees hired after 1965 would not be prohibited by N.D.C.C. § 54-52-02 from obtaining duplicate coverage in PERS. This result would be absurd in light of the original purpose of the duplicate coverage prohibition, and statutes are construed to avoid absurd results. Therefore, it is my

opinion that N.D.C.C. § 54-52-02 applies to retirement plans created and employees hired after 1965.

When the Attorney General issued the 1966 opinion, N.D.C.C. § 54-52-02 applied to "[e]mployees presently covered by a pension plan or retirement plan to which the state has contributed . . . ." 1965 N.D. Sess. Laws ch. 361, § 2. (Emphasis added). In 1973, the Legislature replaced "has contributed" with "is contributing." 1973 N.D. Sess. Laws ch. 246, § 7. The current language of this section clearly applies to current circumstances rather than contributions made before July 1, 1965. However, for several reasons I believe this amendment was simply a technical improvement to the language of the sentence and was not intended to be a substantive change. First, this amendment is not mentioned in the legislative history of the enactment and had very little connection to the purpose of the 1973 law. Second, the amendment was made at the same time as a substantive change to the first sentence in that section. Finally, the original statutory language and its purpose, although less clear and worded in the past tense, would appear to apply to future eligibility decisions based on contributions occurring before that decision is made. Nothing in the original statute limits its application to contributions made before 1965.

Because the prohibition against duplicate coverage applies to retirement plans created and employees hired after July 1, 1965, it is necessary to determine the meaning of "duplicate coverage" as applied to employees having concurrent employment relationships with the state.

Coverage is defined as "[t]he extent of protection provided." The American Heritage Dictionary 334 (2d coll. ed. 1991). Duplicate as an adjective means "[e]xisting or growing in two corresponding parts; double." Id. at 430. Duplicate as a verb means "to make a copy of" or "repeat." Id. For example, N.D.C.C. § 26.1-39-20 refers to "duplicate coverage" and provides that "[i]f an insured obtains a replacement policy that provides equal or more extensive coverage for any property covered in both policies, the first insurer's coverage of the property may be terminated either by cancellation or nonrenewal." (Emphasis added).

Applying these definitions, the phrase "duplicate coverage" does not simply mean two coverages, but refers to coverage in PERS that is a copy or repeat of the employee's original coverage in a pension or retirement plan "to which the state is contributing." If the state contributes to TIAA-CREF based on a person's employment as a teacher, coverage in PERS based on the same employment would be a copy or repeat of the TIAA-CREF coverage. However, in the situation you

describe, the employee's coverage in PERS is not a copy or repeat of the employee's coverage in TIAA-CREF as a professor at Minot State University, because the coverage in PERS is based on the employee's concurrent but separate employment relationship with the Department of Human Services. In this situation, the state is not paying twice or double for the same coverage. Rather, the amount or extent of the employee's coverage is increased based on the additional responsibilities the employee assumed by accepting concurrent employment relationships.

The Legislature has amended N.D.C.C. ch. 54-52 since its enactment to clarify the relationship between PERS and other retirement plans. N.D.C.C. § 54-52-17.2 discusses multiple plan membership and how membership in other plans will be coordinated with PERS. Testimony concerning the enactment of N.D.C.C. § 54-52-17.2 indicates that part-time employment can result in membership in two retirement plans under limited circumstances. Hearing on S. 2154 Before the Senate Committee on Education, 49th N.D. Leg. (January 30, 1985) (Statement of Alan Person). This conclusion is consistent with the prohibition against duplicate coverage because concurrent part-time employment and corresponding contributions to more than one plan are based on different employment relationships.

Based on the plain meaning of N.D.C.C. § 54-52-02, as well as the legislative history and the prior opinions of this office, it is my opinion that the prohibition against duplicate coverage does not apply to an employee who has concurrent employment relationships with the state that result in mandatory participation in PERS and another state retirement plan. Therefore, the PERS Board may not terminate an employee's participation in PERS under N.D.C.C. § 54-52-02 merely because that employee's concurrent employment relationship requires participation in TIAA-CREF or another state retirement plan.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

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ATTORNEY GENERAL

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